

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY J. ZERRIEN and DEPARTMENT OF AGRICULTURE,
FARMERS HOME ADMINISTRATION, Ellsworth, ME

*Docket No. 02-1172; Submitted on the Record;
Issued September 16, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant sustained a recurrence of disability causally related to her accepted work injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for merit review.

Appellant's claim filed on November 15, 1993 was accepted for a cervical strain after appellant, then a 38-year-old loan specialist, hit an automobile that cut across in front of her car into a driveway on June 11, 1993.

Appellant was treated at an emergency room and returned to work. She underwent regular physical therapy treatments over the next five years, based on the medical reports of her attending physician, Dr. Ormond L. Haynes, Jr., Board-certified in internal medicine.

On February 9, 1999 the Office authorized physical therapy services through November 1998 but informed appellant that additional medical information was required before further treatment could be approved. The Office required:

- (1) a diagnosis for which the therapy would be administered;
- (2) specific functional deficits to be treated, and how these affected appellant's physical activities;
- (3) specific goals to be achieved by the additional therapy;
- (4) expected duration and frequency of treatment; and
- (5) the modalities, procedures and/or tests to be administered.

The Office requested this information by letter dated June 12, 2000.

Following receipt of a brief response from Dr. Haynes, the Office informed appellant on March 17, 1999 that the evidence indicated the possibility of a recurrence of disability and explained how to file a claim. The Office requested this information on November 17, 2000.

On December 4, 2000 appellant filed a recurrence of disability claim, alleging headaches and general discomfort in her neck since the June 11, 1993 injury. On February 21, 2001 the Office denied appellant's claim on the grounds that she had submitted no medical evidence establishing a recurrence of disability. The Office noted that appellant alleged continuous neck pain since her 1993 accident, but a June 7, 2000 report from Dr. Ronald Blum, a family practitioner, indicated that her symptoms of headaches and neck pain had disappeared after treatment but reappeared later after some prolonged driving.

Appellant subsequently submitted a statement and a January 24, 2001 letter from Dr. Blum in response to the Office's January 22, 2001 letter and requested reconsideration. By decision dated May 9, 2001, the Office denied modification of its prior decision, finding Dr. Blum's opinion that appellant's current cervical condition was causally related to her 1993 accident "speculative at best."

Appellant again requested reconsideration and submitted a second recurrence of disability claim seeking reimbursement of medical expenses for physical therapy. On December 3, 2001 the Office denied appellant's request on the grounds that the evidence submitted was repetitious and therefore insufficient to warrant review of its prior decision.

The Board finds that appellant has failed to meet her burden of proof to establish a recurrence of disability causally related to her accepted work injury.

A recurrence of disability is defined as a spontaneous material change in the employment-related condition without an intervening injury.¹ A person who claims a recurrence of disability has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted employment injury.² To meet this burden of proof, a claimant must furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.³

Causal relationship is a medical issue,⁴ and the medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. This consists of a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors.⁵ The physician's

¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3.b(a)(1) (May 1997).

² *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

³ *Helen K. Holt*, 50 ECAB 279, 282 (1999).

⁴ *Elizabeth Stanislav*, 49 ECAB 540, 541 (1998).

⁵ *Duane B. Harris*, 49 ECAB 170, 173 (1997).

opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

In this case, the Office informed appellant twice -- on February 9, 1999 and June 12, 2000 -- of the need for medical evidence to establish that her ongoing cervical condition was work related and required further treatment. Dr. Haynes responded that appellant had ligamentous pain in her cervical spine after the accident, with decreased flexion and neck tilt, and recommended physical therapy every two weeks from January through June 1999. In a June 14, 1999 letter he reiterated these findings and added that deficiencies in appellant's range of motion of her neck caused increased pain at work.

Dr. Haynes failed to provide a diagnosis regarding appellant's neck condition or explain why further treatment was necessary for the cervical strain sustained by appellant in 1993.⁷ He offered no specific conclusion that appellant had had any recurrence of disability and did not elaborate on how increased pain in her neck prevented her from working. In fact, he released her to full duty in June 1994, with a recommendation for physical therapy once a month for a year.

Dr. Haynes stated on January 13, 1999 that appellant had no neurological symptoms at that time and that her pain had gradually improved following physical therapy, which was discontinued in November 1998. Dr. Haynes' reports are insufficient to show that the physical therapy he recommended was necessary to treat any residuals of the cervical strain appellant sustained in June 1993 or that any disability for work was causally related to the accepted injury.⁸

In his June 7, 2000 evaluation, Dr. Blum diagnosed a whiplash resulting from the 1993 accident, but noted that appellant's occipital headaches, which occurred monthly and neck pain from turning her head "completely disappeared" after treatment in 1998. Dr. Blum stated that at this time appellant described increasing neck discomfort, characterized as fatigue, with prolonged driving and a pulling sensation in the sides of her neck when she turned her head. He added that appellant had no regular exercise regimen but "does ski, walk and occasionally use a stair stepper."

Physical examination showed that appellant was able to turn her head much more readily than prior to her treatment last year. Her cervical and thoracic postures were normal; range of motion of her cervical spine was 50 degrees extension, 55 degrees flexion and 65 degrees rotation left and right; no trigger points were identified; and there was no tenderness over the

⁶ Gary L. Fowler, 45 ECAB 365, 371 (1994).

⁷ A computerized axial tomography (CAT) scan done on August 27, 1993, two months after the accident, showed normal cervical discs, no evidence of spinal stenosis and no identifiable abnormalities.

⁸ See *Sheila Peckenschneider*, 49 ECAB 430, 432 (1998) (finding that the Office was not required to pay for appellant's acupuncture treatments because no physician supported the need for such therapy with a rationalized medical opinion).

occipital, cervical spine, scapulae or muscle groups of the pectoral girdle. Dr. Blum recommended therapy to “relieve cervical pain and improve function, *i.e.*, driving.”

In a January 24, 2001 follow-up report, Dr. Blum stated that appellant’s “signs and symptoms at the time of my evaluation [in June 2000] and recommendations for ongoing therapy appear to be directly related to the trauma she sustained in the June 1993 motor vehicle accident.”

Dr. Blum offered no medical rationale for this conclusion. While noting that appellant’s symptoms had cleared up after treatment in 1998, he failed to explain why increased pain and headaches in 2000, which appellant attributed to prolonged driving, were causally related to the cervical strain sustained in 1993. He also failed to explain his diagnosis of whiplash resulting from the 1993 accident in light of a June 21, 1993 report from Dr. Kenneth C. Christian, Board-certified in internal medicine, who diagnosed only a cervical strain and an earlier treatment record dated September 24, 1993, which diagnosed a cervical strain but found no disability or abnormalities.⁹ Because of these defects, Dr. Blum’s reports are insufficiently rationalized to meet appellant’s burden of proof in establishing that her current cervical condition is causally related to the accepted work injury.¹⁰

The Board also finds that the Office acted within its discretion in refusing to reopen appellant’s claim for merit review.

Section 8128(a) of the Federal Employees’ Compensation Act¹¹ vests the Office with discretionary authority to determine whether it will review an award for or against compensation.¹²

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).¹³ The application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously

⁹ Appellant was seen in the emergency room on June 11, 1993 and again on June 21, 1993 for x-rays, which were normal. Dr. Stephen Nightingale, Board-certified in internal medicine, stated on July 12, 1993 that appellant complained of “persistent neck aches,” unassociated with any numbness, tingling or paresthesia.” He found full range of neck motion and diagnosed a neck strain.

¹⁰ See *Michael E. Smith*, 50 ECAB 313, 316 (1999) (finding that appellant failed to submit a rationalized medical opinion on causal relationship).

¹¹ 5 U.S.C. §§ 8101-8193.

¹² 5 U.S.C. § 8128(a) (“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application”).

¹³ 20 C.F.R. § 10.608(a) (1999).

considered by the Office.¹⁴ Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review of the merits.¹⁵

With her request for reconsideration, appellant submitted a March 8, 2002 report from Dr. Blum, a statement explaining her disagreement with the Office's May 9, 2001 decision, and continuation of copies of medical records. She requested payment of \$1,729.80 in medical bills from June 7 to August 2, 2000.

Dr. Blum criticized various statements in the May 9, 2001 decision, noting that he had provided a diagnosis for appellant's neck condition and a history of her condition between the 1993 injury and the alleged recurrence. He stated that appellant had received ongoing treatment for persistent neck symptoms over the years after the 1993 accident. While 85 percent of whiplash patients recovered within 3 months of their injuries, up to 15 percent, including appellant in this case, go on to have chronic problems and suffer a long-term pain cycle as a result.

Dr. Blum's March 8, 2002 report is new medical evidence, pursuant to subsection (iii), but it is neither relevant nor pertinent to the issue of whether appellant's current cervical condition is causally related to the 1993 accident. In his previous reports, Dr. Blum failed to provide any medical rationale for connecting the 1993 cervical strain with appellant's current complaints of neck pain. While the record shows a history of physical therapy, none of the medical evidence submitted establishes the requisite causal relationship. Dr. Blum's latest report does not address this defect and therefore does not require the Office to reopen appellant's claim.¹⁶

Appellant argued that because the Office authorized her continuous physical therapy treatments and doctor visits, her 1993 injury was not a minor one that resolved in a few months. The Office's agreement to authorize treatment proved that she had sustained a permanent injury that had affected her quality of life. This argument has not been previously considered by the Office. However, it is similarly irrelevant to the issue in this case -- the causal relationship of appellant's current neck condition to the accepted work injury.¹⁷

The fact that the Office has paid for medical treatment does not establish a causal relationship between the condition being treated and the accepted work injury or factors.¹⁸ Such

¹⁴ 20 C.F.R. § 10.606(b)(1)-(2).

¹⁵ 20 C.F.R. § 10.608(b).

¹⁶ See *Eugene L. Turchin*, 48 ECAB 391, 397 (1997) (finding that appellant's failure to submit new and relevant evidence on reconsideration justified the Office's refusal to reopen his case for merit review).

¹⁷ See *Cleopatra McDoughal-Saddler*, 50 ECAB 367, 369 (1999) (Office properly denied merit review on grounds that appellant's legal contention was previously raised and decided).

¹⁸ *Dale E. Jones*, 48 ECAB 648, 649 (1997).

a relationship must be established by rationalized medical opinion and appellant here has failed to submit such evidence.

Appellant has failed to show that the Office erred in interpreting the law and regulations under the Act, nor has she advanced any relevant legal argument not previously considered by the Office. Inasmuch as appellant failed to meet any of the three requirements for reopening her claim for merit review, the Office properly denied her reconsideration request.

The May 9 and December 3, 2001 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
September 16, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member